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SUPREME COURT, U.S.

No. 05-1343

IN THE

Supreme Court of the United States

TROY KING, *et al.*,

Petitioners,

v.

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a federal district court sitting in New York may exercise personal jurisdiction over the Attorneys General of multiple States, in an action brought by a manufacturer to enjoin them from enforcing identical State laws that require the manufacturer to (1) enter into a settlement agreement with forty-six States (including New York), or, alternatively, (2) make payments into an escrow account for the benefit of the regulating States, which are ultimately tied to, and calculated based on, the payments that the manufacturer would have otherwise paid under the settlement agreement.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

None of the Respondents has a parent corporation, and there is no publicly held company that owns 10% or more of the stock of any Respondent.

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STATEMENT OF THE CASE

In November 1998, Attorneys General of forty-six States, including New York, and six U.S. territories entered into the Tobacco Master Settlement Agreement ("MSA") with the nation's four largest tobacco product manufacturers. (App. 4a). The MSA requires these manufacturers, and all other manufacturers that subsequently join the MSA (collectively "Participating Manufacturers"), to pay the settling sovereigns ("MSA States") approximately $206 billion over twenty-five years, and $9 billion each year thereafter, subject to certain contingencies, offsets and adjustments. *Id.*

The MSA contains *inter alia* an appendix of model legislation (hereafter "Escrow Statute") that was drafted by the MSA's negotiators for enactment in each of the MSA States. (App. 5a – 6a). The purpose of the Escrow Statute, according to the MSA, is to "effectively and fully neutralize the cost disadvantages" that Participating Manufacturers might experience vis-à-vis manufacturers that do not join the MSA. MSA § IX(d)(2)(E). By 2000, each MSA State enacted the Escrow Statute in its model form. (App. 6a). The Escrow Statute requires a manufacturer whose cigarettes are sold in an MSA State to: (1) enter into the MSA with every MSA State (and make annual payments required under the MSA); or (2) deposit funds into an escrow account annually for the benefit of that MSA State, which must be held for twenty-five years. (App. 21a – 23a). If it chooses not to join the MSA, the amount that a manufacturer must deposit and hold in escrow is tied to, and based ultimately on, the amount the manufacturer would have been otherwise required to pay under the MSA as a Participating Manufacturer – *i.e.*, an amount that is calculated based on the manufacturer's nationwide sales and its national market share vis-à-vis all other manufacturers in the United States . (App. 23a – 24a).

According to filings submitted by Petitioners in various court proceedings, the Escrow Statutes are critical to the implementation of the MSA, with which they have a substantial nexus. (App. 6a). Indeed, Petitioners have posited that the invalidity or inability to enforce the Escrow Statute of any MSA State threatens the effectiveness and enforcement of the MSA in all MSA States.

Respondents commenced this action in July 2002, to challenge the Escrow Statutes *inter alia* on antitrust and constitutional grounds. The complaint seeks to enjoin the New York Attorney General and Petitioners – Attorneys General of thirty States – from enforcing the Escrow Statutes as against Respondents.[1] Two of the Respondents are manufacturers whose tobacco products have been sold in the MSA States represented by Petitioners. The third Respondent is a distributor that sells tobacco products throughout the United States.

The district court initially dismissed Respondents' complaint for failure to state a claim and, as to Petitioners, for lack of personal jurisdiction. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2003 U.S. Dist. LEXIS 16995 (S.D.N.Y. Sept. 29, 2003) (App. 43a). On reconsideration, the district court reinstated the complaint's antitrust claim as against the New York Attorney General, only. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 2004 U.S. Dist. LEXIS 13373 (S.D.N.Y. Jul 15, 2004) (App. 35a). Respondents timely appealed the district's dismissal of Petitioners on personal jurisdiction grounds and the dismissal of Respondents' non-antitrust claims. On appeal, the United

1. The Complaint also seeks similar relief with respect to complementary legislation or "Contraband Laws" enacted by the MSA States. The Contraband Laws serve to enhance enforcement of the Escrow Statutes, by prohibiting the sale of cigarettes produced by a manufacturer that is deemed to be non-compliant with an Escrow Statute.

States Court of Appeals for the Second Circuit affirmed, in part, and reversed, in part, the decisions of the district court. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005). The Second Circuit did not disturb the district court's finding that Respondents stated a claim that the MSA and Escrow Statutes violate the Sherman Act, 15 U.S.C. § 1. The Second Circuit held, however, that Petitioners were subject to personal jurisdiction in New York, (App. 13a), and that the complaint stated a claim that the Escrow Statutes violate the Commerce Clause, Const. Art. I, Sec. 8, cl. 3. (App. 24a).

Previously, the Second Circuit held in separate proceedings that, as pleaded and on their face, the MSA and Escrow Statutes establish and enforce a hybrid restraint of trade that is not closely or actively supervised by state officials. *Freedom Holdings v. Spitzer*, 357 F.3d 205 (2d Cir.), *rehearing denied*, 363 F.3d 149 (2d Cir.). The "competition-neutralizing" attributes of the Escrow Statutes, along with counterpart MSA provisions that penalize Participating Manufacturers for gaining market share, have allowed the manufacturers that negotiated and initially executed the MSA to raise their prices uniformly and lock-step by more than 300% of that which was necessary to finance their annual MSA payments.

On the appeal, the Second Circuit observed that a manufacturer's payments under the MSA and, alternatively, into escrow under the Escrow Statutes are ultimately tied to the manufacturer's nationwide sales and its national market share vis-à-vis all competing manufacturers in the United States. (App. 21a-23a). The allegations of the Complaint demonstrated that the purpose and effect of the MSA and Escrow Statutes is, thus, to create an interdependent and interconnecting system of regulation that has the impermissible extraterritorial effect of regulating commerce interstate – indeed, nationwide. (App. 24a).

Acknowledging that the MSA is much like any other contract, and that a substantial nexus exists between the MSA and the Escrow Statutes, which, together, establish and enforce a hybrid restraint of trade, the Second Circuit went on to hold that specific personal jurisdiction over Petitioners existed in New York for purposes of enjoining these restraints. (App. at 13a). For substantially the same reasons, the court also held that jurisdiction existed in respect of Respondents' Commerce Clause claims, because the Complaint's allegations demonstrated that the Escrow Statutes and MSA establish an interconnecting system of regulation that effectively regulates interstate commerce, *i.e.*, commerce beyond a particular State's borders. (App. 24a n.5).

REASONS FOR DENYING THE PETITION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Second Circuit's Opinion ("Opinion"), is in conflict with a decision of this Court or another Court of Appeals, or that the Second Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

Petitioners' argument for certiorari rests on an incomplete description of the Escrow Statutes. The Illinois Escrow Statute, for example, does not "reach only cigarette sales transactions within that particular State." Pet. at 8. The Escrow Statute expressly requires a manufacturer whose cigarettes are sold in Illinois, to enter into the MSA with Illinois *and forty-five other States* (including New York); alternatively, the manufacturer must make payments into escrow for the benefit of Illinois, which must be held for twenty-five years. (App. 21a – 23a). The amounts held in escrow are expressly tied to, and ultimately determined based

on, the amount that the manufacturer would have otherwise paid under the MSA. *Id.* The Petition fails to treat with these provisions of the Escrow Statutes and presents a skewed interpretation of their terms, by arguing that an Escrow Statute only applies in a particular State if a manufacturer sells cigarettes in that State. Under any circumstance, when a State law mandates that a person enter into an agreement with another State, either as an exclusive or alternative means of complying with that law, it cannot seriously be disputed that officials charged with enforcing the law may be amenable to suit in that other State.[2]

In addition, given that payments under the MSA are calculated based on a manufacturer's nationwide sales and its national market share vis-à-vis all other manufacturers in the United States, and given further Petitioners' acknowledgment that the Escrow Statutes are intended make a manufacturer's escrow payment for any one State equivalent to the amount that the manufacturer would otherwise be required to pay all States under the MSA, it is improper to recast the legislation as affecting only sales within a given State in which the manufacturer's products are sold.

The Petition does not seek review of the findings below that Respondents have stated a claim that the Escrow Statutes and MSA restrain interstate trade and commerce in violation of the Sherman Act, 15 U.S.C. § 1, or that they violate the

2. This conclusion is made manifest by additional facts that Petitioners have not brought to the Court's attention. On April 3, 2006, one of the Respondents whose products are now sold in five States, sought to comply with the Escrow Statutes of those States by making application to join the MSA, as alternatively required. To join MSA, however, the Respondent needed the agreement and approval of all other States that are parties to the settlement, including New York. That approval was denied. In this way, the Illinois Escrow Statute, for example, effectively confers authority on forty-five other States to determine and control compliance with Illinois law.

Commerce Clause, by establishing and implementing an interdependent and interconnecting system of interstate regulation, the purpose and effect of which is to control and regulate prices nationwide. Even if the Court looked beyond precedent and the Constitutional precepts of personal jurisdiction and due process, which do not extend to State officials sued in their official capacity, and disregarded further Petitioners' acknowledgment that each Escrow Statute has a substantial nexus with, and is critical to, the enforcement and implementation of the MSA in all States, Petitioners would still be subject to personal jurisdiction in any forum in which the anticompetitive or unconstitutional effects of the legislation are realized, including in New York.

1. The Due Process Protections of the Fifth Amendment do not Extend to Attorneys General Sued in their Official Capacities

Petitioners contend that their Fifth Amendment rights of due process are abridged when a federal court exercises personal jurisdiction over them in any State other than their home State. (Pet. at 6). The Fifth Amendment's due process rules apply to a "person" deprived of life, liberty or property. Amend. V, cl. 3. Petitioners do not contend that they, or the States they represent, have been deprived of life, liberty or property.

Moreover, citing the Court's long-standing precedent, the district court in *In re Reserves Devel. Corp.*, 64 B.R. 694 (W.D. Mo. 1986), observed that an action against a State official in his or her official capacity is, in essence, an action against the State itself. *Id.* at 697. Because a State is not a "person" entitled to due process under the Fifth Amendment (the Constitutional text that speaks to the due process limitations of federal courts), the district court found that

the West Virginia Attorney General sued in his official capacity (*i.e.*, the State) lacked standing to claim that the Fifth Amendment prevented the federal court from exercising personal jurisdiction over him in that capacity. *Id.* at 697-98.[3] In treating with Petitioners' argument regarding the propriety of defending a multi-defendant case in New York, the district court was bound by only the federal venue rules, not rules governing personal jurisdiction over persons. Petitioners have never claimed that venue was improper in New York, or that an alternative, efficient federal forum is better suited for the litigation of Respondents' federal question claims.

2. The Escrow Statutes do not Stand Alone Or Apart from the MSA and its Terms

In determining issues of personal jurisdiction, federal courts have looked to the long-arm statute of the State in which it sits and apply the forum State's personal jurisdiction rules. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997). The Second Circuit held that the MSA is a contract in many respects like any other. (App. 12a). Similarly, personal jurisdiction over the parties to a settlement agreement, like any other contract, exists where the agreement was negotiated and executed.

Petitioners do not, and could not, dispute that a federal court in New York would possess personal jurisdiction over

3. The foregoing principles appear consistent the venue rules applicable to district courts. 28 U.S.C. § 1391(b) (multi-defendant civil action based on federal question may be brought "in a judicial district in which *any* defendant may be found") (emphasis added); *Cf.* 28 U.S.C. § 1391(a) (multi-defendant civil action based on diversity may be brought "in a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced").

them in New York, for a claim based on, or arising out of, the MSA. Petitioners argue, however, that the Escrow Statutes have no nexus with the MSA. (Pet. at 8). In support of their argument, Petitioners point to certain terms of the Illinois Escrow Statute, which apply to a manufacturer only if the manufacturer's cigarettes are sold in Illinois, and only on account of those sales. *Id.* Petitioners' arguments are myopic. The Illinois Escrow Statute provides that a manufacturer whose cigarettes are sold in Illinois must enter into the MSA with 46 States (including New York), or, alternatively, the manufacturer must pay into escrow an amount that is ultimately determined based on the payments the manufacturer would be required to pay under the MSA to all MSA States on account of its cigarettes sold in Illinois. (App. 21a – 23a).

Contrary to Petitioners' arguments, the MSA does not stand alone, separate and apart from the Escrow Statutes. Each Escrow Statute requires a manufacturer alternatively to enter into the MSA with every other MSA State, including New York. The MSA's terms are also incorporated by express reference into each Escrow Statute and control each manufacturer's ultimate escrow obligation under the Escrow Statutes. This is not a case where a State law has no application beyond it boundaries, or no application to persons or parties located beyond its borders. In short, the Court has never pretermitted or reserved for another day personal jurisdiction over State officials charged with enforcing a State law that expressly requires a person to enter into an agreement with multiple other States, or imposes a liability on a person that is based ultimately on payments that it would otherwise make under that multistate agreement. Given the Complaint's allegations, and the Second Circuit's acknowledgment that Respondents have alleged that the MSA and Escrow Statutes, together, restrain trade and regulate interstate commerce (App. at 13a), there is no precedent of the Court or any Court

of Appeals that would deny personal jurisdiction under the circumstances presented.

3. Petitioners are Subject to Personal Jurisdiction under The Forum State's Rules Governing Personal Jurisdiction

As stated, under New York law, a non-domiciliary may be served outside New York, and sued upon any cause of action, under the following circumstances:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent:

(1) transacts any business within the State . . . ; or

(2) commits a tortious act within the State.

N.Y. C.P.L.R. § 302(a).

Under the "transaction of business test of CPLR 302(a)(1), the jurisdiction of New York courts extends to any nonresident who has "'purposely availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections of its laws.'" *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 787 (2d Cir. 1999), *quoting Parke-Bernet Galleries Inc. v. Franklyn*, 26 N.Y.2d 13, 18, 256 N.E.2d 506 (1970). The cause of action need not be for breach of contract, however. Section 302(a) applies as well to actions in tort when supported by a showing that the tort arose out of the relevant transactions. *Bank Brussels*, 171 F.3d at 787.

In addition to the above standards, when a Fed. R. Civ. P. 12(b)(2) motion is made before discovery takes place, a plaintiff need only allege facts constituting a prima facie showing of personal jurisdiction. *PDK*, 103 F.3d at 1108. The pleadings and affidavits are construed in plaintiff's favor at such an early stage. *Id.*

As applied, New York's long arm statute, CPLR 302(a), provides for "personal jurisdiction over non-domiciliaries," including officials of other States. *See United States Steel Corp. v. MultiState Tax Comm'n*, 367 F. Supp. 107, 120 (S.D.N.Y. 1973) ("federal court would not be forbidden from utilizing the state long-arm statute to obtain personal jurisdiction [over a sister state's officials] in case where federal subject matter jurisdiction clearly applies"); *see also Matter of Anonymous v. Kaye*, 1995 WL 617795 (S.D.N.Y. No. 94 Civ. 2882 (JFK), Oct. 19, 1995) at *4 ("New Jersey Defendants may also be subject to *in personam* jurisdiction under section 302, New York's long-arm statute").

In this action, Petitioners do not dispute that they have minimum contacts with New York in connection with the MSA. Their sole argument in this regard is that these contacts are irrelevant to any analysis regarding their amenability to suit in connection with the Escrow Statutes. For the reasons stated *supra*, Petitioners' argument is specifically refuted by the terms of the MSA and Escrow Statutes, as well as the record.

Once it is shown that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in the light of other factors to determine whether the assertion of personal jurisdiction would be reasonable and comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), *quoting International Shoe Co. v.*

Washington, 326 U.S. 310, 320 (1945). The additional factors are (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum State in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; (5) the shared interest of the States in furthering substantive social policies. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568 (2d Cir. 1996), *citing Asahi Metal Indus. Co. v. Superior Court*, 480 U.S 102, 113-14 (1987).

The exercise of jurisdiction is favored unless the defendant presents "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Petitioners have presented no case that the presence of some other considerations would render jurisdiction over them unreasonable. Indeed, the record before the Second Circuit demonstrated that Petitioners have twice appeared before courts in New York, to argue in favor of their interpretation of the MSA and to emphasize the New York Escrow Statute's nexus with the MSA and every other State's Escrow Statute. *See In re Sayeh*, 91 N.Y. 2d 306, 319 (1997) ("Use of the New York courts is a traditional justification for the exercise of personal jurisdiction over a nonresident."). In short, there is no burden or overriding concern that Petitioners can point to that would warrant their dismissal on personal jurisdiction grounds, or in favor of Respondents' having to bring thirty-one separate federal court actions raising the same federal questions.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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